No. 73-1231

In the Supreme Court of the United States

OCTOBER TERM, 1973

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF FOR PETITIONER LINDEN LUMBER DIVISION, SUMMER & CO.

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OPINIONS BELOW

The opinion of the court below (Pet., pp. A1-A26) [1] is reported at 487 F. 2d 1099. The decision and order of the

[1] The opinion of the lower court, as well as the opinions of the Board and its administrative law judge, are reproduced in the petition for a writ of certiorari (hereafter "Pet.") which Linden Lumber Division, Summer & Co. (hereafter "Linden" or "the Company") filed with this Court. Supplemental materials, including

National Labor Relations Board (Pet., pp. A33-A90) is reported at 190 NLRB 718.

JURISDICTION

The judgment of the Court of Appeals (Pet., pp. A27-A28) was entered on September 13, 1973. Thereafter Linden was granted leave to intervene before the Court of Appeals and filed a timely petition for rehearing which was denied on November 6, 1973 (Pet., p. A31). This Court, on December 23, 1973, entered an order extending the time for Linden to file its petition for a writ of certiorari until February 10, 1974 (Pet., p. A32). The petition was filed on that date, and on April 22, 1974, the Court granted the petition and consolidated this case with No. 73-1234. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*), are set forth in the petition at pp. A91-A92.

QUESTION PRESENTED

May an employer be compelled to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interfered with such processes so as to preclude a fair election?

(Footnote continued)

portions of the transcript of the underlying proceedings before the administrative law judge, as well as exhibits introduced in that proceeding, have been reproduced in a separate supplemental joint appendix prepared by the National Labor Relations Board, the petitioner in consolidated case No. 73-1234.

STATEMENT OF THE CASE.

Having obtained authorization cards[2] from a majority of the Company's employees in an appropriate bargaining unit, the Union[3] demanded, by letter dated January 3, 1967,[4] that it be recognized as the employees' collective bargaining representative. On January 5, the Company responded by letter, stating that it doubted the Union's claimed majority status and suggesting that the Union petition the Board for an election. On January 6, the Union filed such a petition. In ensuing discussions to establish the details for an election, Linden declined to enter into a consent election agreement or abide by the results of an election on the ground that the Union's organizational campaign had been improperly assisted by Company supervisors.[5] The Company did, however, offer to enter into a consent agreement with the Union if it would submit a "fresh" showing of interest untainted by supervisory participation.

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[2] Nothing in the authorization cards served to warn the employees that signing the cards could constitute a waiver of their right to an election. The cards (General Counsel's Exh. No. 4 reproduced in the Joint Appendix) provided:

> "I the undersigned employee of Linden Lumber Company hereby request membership in Truck Drivers Union Local No. 413 and authorize said union to represent me and in my behalf to negotiate an agreement as to hours of labor, wages, union shop, and other employment conditions."

[3] Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] All dates hereafter refer to 1967 unless otherwise noted.

[5] The Board does not permit litigation of supervisory solicitation matters in representation case hearings, and a refusal to bargain is, accordingly, necessary to judicially test that question. *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457 (9th Cir. 1947).

The Union voluntarily withdrew its election petition on February 3 and, on February 6, presented the Company with a renewed bargaining demand accompanied by an employee statement, prepared at a Union meeting attended by the very employees whose supervisory status was in dispute, reaffirming support for the Union. The Company declined this demand by letter dated February 8, asserting that the Union's purported membership was still improperly influenced by supervisors and that, in any event, as Linden had previously urged, the Union should prove its claim in a Board election. The Union instead continued to spurn the Board's election processes and struck for recognition on February 15.[6] Shortly after commencement of the strike, which continued until June 1, the Union filed the instant refusal to bargain charges against Linden. It is undisputed that the Company committed no unfair labor practices which precluded a fair election.[7]

The Board concluded that Linden ". . . should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." In reaching this conclusion, the Board expressly

[6] Not all of the employees who signed authorization cards subsequently joined the strike (Pet., p. A90); similarly, in the companion *Wilder* case, not all of the card-signers continued to picket for the duration of the strike (Bd. Pet., p. 121).

[7] At the conclusion of the strike, the Company refused to reinstate two employees it had contended were not protected by the Act. The Board found this to be an unfair labor practice although of insufficient impact to prevent "a fair and truly representative election" (Pet., pp. A37-A38); the Company thereupon reinstated the two employees and this issue was not presented to the court below.

declined "to reenter the 'good faith' thicket . . . which we announced to the Supreme Court in *Gissel* [*N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)] we had 'virtually abandoned . . . altogether', *id.*, 594" (Pet., p. A41). In the Board's view, bargaining orders, in the absence of election interference, would be appropriate only where, in contrast to the present case, the Union's majority status had been proven by a "mutually acceptable and legally permissible means" (Pet., pp. A41-A42).

On petition for review, the Court of Appeals reversed. It noted that the present question had been left undecided in *Gissel* and that, in its opinion, the position adopted by the Board was "inconsistent with the Act." (Pet., pp. A13, n. 25 and A26). The court, contrary to the Board, declared that an employer faced with a demonstration of union majority support cannot merely refrain from election interference; that a company confronted by such a situation must affirmatively "evidence good faith" and "resolve the possibility [of majority status] through a petition for an election" or, alternatively, recognize the union forthwith (Pet., p. A23). The court remanded to the Board "to reconsider, what option, consistent with the statute, it wishes to follow" (Pet., p. A26).

SUMMARY OF ARGUMENT

I. The legislative history and judicial evolvement of the National Labor Relations Act, as well as this Court's opinion in *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575 (1969), all mandate that an employer who does not interfere with the Board's election processes, nor voluntarily agree to resolve a union's claim of majority status by other permissible means, may lawfully insist that the union prove its status in a secret ballot election.

A. The Board recognized early in its administration of the Act that secret ballot elections were the most de-

sirable vehicle for ascertaining employee representational desires. Congress agreed, and in the Taft-Hartley amendments in 1947, restructured the Act to emphasize its preference for resolving recognition claims through the Board's election machinery. This preference for an election is dictated by the Act's concern with protecting employee free choice and the concomitant inferiority of authorization cards or other secondary evidence of majority status in fulfilling that goal.

B. Notwithstanding the superiority of the election processes, employers may still voluntarily recognize unions on the basis of secondary evidence and be subject to a bargaining order if they renege upon that recognition. Similarly, employers whose own misconduct interferes with a fair election may be subject to a bargaining order predicated upon authorization cards or other secondary evidence of majority status.

C. The preference for elections which was manifested in the 1947 amendments to the Act, together with the Board's determination, approved by *Gissel*, that an employer's good faith or subjective motivation is irrelevant, demonstrate that an employer who does not voluntarily recognize a union nor interfere with the Board's election processes cannot be subject to a bargaining order in the absence of union success in a secret ballot election. Any other view would catapult secondary evidence into the functional equivalent of an election and, notwithstanding the three-category bargaining order approach of *Gissel*, impose an absolute bargaining obligation on an employer confronted by a card-based bargaining demand or recognitional strike.

II. The lower court's conclusion that, where a union presents secondary evidence of majority status to an employer he must forthwith recognize the union or petition

for an election, is wrong. Imposition of such a novel and unwarranted penalty for declining recognition constitutes an improper judicial restructuring of the Act.

A. The lower court's conclusion that an employer "must be put to some . . . kind of test to evidence good faith" (Pet., p. A26) disregards *Gissel's* repudiation of *any* test which seeks to divine employer motivation. If good faith cannot be used as a basis for a bargaining order, it similarly cannot be used to force upon an employer an obligation not imposed by the Act.

B. The Court of Appeals' requirement that an employer must file an election petition distorts section 9(c)(1)(B) of the Act which only permits, but does not require, an employer to file such a petition. It also vitiates an employer's right, guaranteed by both the First Amendment and by section 8(c) of the Act, to lawfully attempt to persuade his employees to refrain from unionization. Finally, contrary to the congressional purpose manifested in section 8(b)(7) of the Act, the decision below encourages protracted recognitional strikes, rather than resort to the Board's election machinery, to resolve representational questions.

ARGUMENT

I.

AN EMPLOYER WHO DOES NOT INTERFERE WITH THE BOARD'S ELECTION PROCESSES MAY LAWFULLY INSIST THAT A UNION DEMONSTRATE ITS CLAIMED MAJORITY STATUS IN A SECRET BALLOT ELECTION.

In *Gissel*, this Court recognized that the Board's election procedures were the "preferred route" for a union to demonstrate its majority status; that indeed,

> . . . the policies reflected in § 9(c)(1)(B) fully support the Board's present administration of the Act . . . an employer can insist on a secret ballot election, unless, in the words of the Board, he engages "in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election." 395 U.S. at 600, 596, 602.

Gissel recognized, however, that, notwithstanding the more desirable route of an election to resolve representational claims, secondary evidence of majority status, such as authorization cards or strike support, although clearly less reliable, could serve as a basis for a remedial bargaining order when a fair election was rendered impossible. The Court did not reach the question presented here, *viz.*, "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (395 U.S. at 595 and n. 18). Both the legislative history and judicial evolvement of the Act, as well as *Gissel* itself, all require that this unanswered question be resolved in negative.

A.

The starting point is section 9 of the original Wagner Act. That section permitted the Board to certify a union as a result of either a secret ballot election or "any other suitable means" (29 U.S.C. § 159(c) (1947 ed.)) as, e.g., presentation of authorization cards from a majority of employees or employee support for a union-called strike or strike vote. *Gissel*, 395 U.S. at 596-7. The Board, nevertheless, soon concluded that "the policies of the Act will be best effectuated if the question of representation . . . is resolved in an election by secret ballot" rather than by such secondary evidence. *Cuhahy Packing Company*, 13 NLRB 526, 531-532 (1939). This elimination of "other suitable means" as the basis for Board certification was, in turn, codified by the 1947 Taft-Hartley amendments to the Act.

Congress, in its efforts to encourage utilization of the Board's election machinery, went further than limiting the benefits of certification to unions which survive the crucible of an election. This congressional design was also manifested in a variety of other amendments: an employer, as well as a union, was thereafter permitted by section 9(c)(1)(B) to file an election petition (see *Gissel*, 395 U.S. at 599-600); section 8(c) was added to guarantee the right of employees to express their views on unionization; and the electoral process was further protected by the insertion of section 8(b)(1)(A) to forbid coercive union tactics and by the 1959 inclusion of section 8(b)(7) to preclude certain forms of recognitional picketing

The reasons for such congressional recognition of "the acknowledged superiority of the election process" (*Gissel*, 395 U.S. at 602) are not difficult to discern. In contrast to the Board's "laboratory" election conditions, which are

"as nearly ideal as possible",[8] secondary indicia of majority support are markedly inferior. Employees may engage in a strike, for example, for a multitude of reasons—fear,[9] respect for a picket line, peer group pressures, personal hostilities and the like—which are not tantamount to selection of the union as a bargaining representative. Authorization cards are similarly a "notoriously unreliable" means for ascertaining employee choice[10] which neither register changes in voter attitude resulting from the election "crucible"[11] or properly manifest "the ultimate choice

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[8] *General Shoe Corp.*, 77 NLRB 124 (1948), quoted with approval in *Gissel*, 395 U.S. at 596, n.8; *Dal-Tex Optical Corp.*, 137 NLRB 1782 (1962).

[9] See *N.L.R.B. v. Union Carbide Corporation*, 440 F. 2d 54, 56 n.1 (4th Cir. 1971), *cert. den.* 404 U.S. 826, in which the court quoted the reasons for employee Mullins refusal to cross a picket line at his place of work:

"Q. Well, why didn't you cross the picket lines, Mr. Mullins?

A. Well, I was afraid.

Q. Any other reason?

A. Well, that was the main reason. I was afraid. It was too dangerous.

Q. And why were you afraid?

A. Well, I was afraid somebody would beat me up or burn my house down or something like that."

[10] *Sunbeam Corp.*, 90 NLRB 546, 550-1 (1952). See also, e.g., *N.L.R.B. v. Flomatic Corp.*, 347 F. 2d 74-78 (2nd Cir., 1965), and *N.L.R.B. v. S.E. Nichols Co.*, 380 F. 2d 438, 442 (2nd Cir. 1967).

[11] Significantly, a recent comprehensive study (Goldberg and Getman, *The Myth of Labor Expertise*, 39 U.Chi. L. Rev. 681, 692 (1972)) concluded that voter positional changes during a Board election campaign are almost always *away* from initial support for the union: "[T]here have been almost no changes in the other direction." See also Perl, *The NLRB and Bargaining Orders*, 15 Vill. L.Rev. 106, 115-116 (1969).

of a bargaining representative . . ." *Midwest Piping and Supply Co.*, 63 NLRB 1060, 1070 n.13 (1945). Employees who sign cards may, as in this case and *Wilder*, not necessarily even support a subsequent strike. Alternative selection techniques, in short, are simply not, as the Board, Congress and this Court have repeatedly emphasized, as accurate a reflection of employee desires as a Board election.

B.

The congressional preference for elections did not preclude an employer from utilizing secondary indicia of employee sentiment to voluntarily recognize a union.[12] The Taft-Hartley Congress specifically left intact the "designation or selection" language of section 9(a) of the Act, rejected a House modification of section 8(a)(5) and "did not restrict an employer's duty to bargain under section 8(a)(5) solely to those unions whose representative status is certified after a Board election." *Gissel*, 395 U.S. at 596-8, 600.[13] Authorization cards and other secondary evidence may also be utilized to establish the requisite "showing of interest" under section 9(c)(1)(A) to invoke the Board's election processes. And, as *Gissel* made clear, so that an employer cannot profit from his own misconduct (*Franks Brothers* v. *N.L.R.B.*, 321 U.S. 702 (1944)), where there is "conduct disruptive of the bargaining process, cards may be the most effective—perhaps the only—way of assuring employee choice." *Gissel*, 395 U.S. at 602.

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[12] See, e.g., *N.L.R.B.* v. *Montgomery Ward and Co.*, 399 F. 2d 409 (7th Cir., 1968); *N.L.R.B.* v. *Broad Street Hospital & Medical Center*, 452 F. 2d 302 (3rd Cir. 1971). *Cf. Garment Workers Union* v. *N.L.R.B. and Bernhard-Altmann Corp.*, 366 U.S. 731 (1961), proscribing recognition, even if in good faith, of a minority union.

In sum, while the Taft-Hartley amendments eliminated authorization cards or other secondary evidence as a basis for certification, they did not foreclose the use of such evidence to otherwise demonstrate majority support. It does not follow, however, particularly in view of the repeatedly expressed preference for elections, that the availability of other methods whereby "an employer *may* satisfy itself as to the union's majority status" (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8 (1956) (emphasis added)), can be equated to an affirmative *obligation* to grant such recognition. A card majority or other asserted secondary evidence of employee sentiment does not, as the court below properly concluded (Pet., p. A19, n.42), "*per se* invoke . . . a duty to bargain."[13]

To be sure, prior to *Gissel*, where an employer did not have "a good faith doubt as to the Union's majority status" or there did not exist a "bona fide dispute" under *United Mine Workers*, a bargaining order could issue. *Gissel*, 395 U.S. at 592-3, 597, n. 11 and 598. *Gissel*, however, endorsed the Board's termination of precisely such an inquiry into employer good faith and subjective motivation (*Id.* at 594). It rendered immaterial any assessment of the employer's knowledge or state of mind when declining to recognize a union which assertedly enjoyed majority support on the basis of secondary evidence. Surely, if a bargaining order is not to be imposed

[13] See also Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U.Chi.L.Rev. 314, 318 (1972); and Welles, *The Obligation To Bargain on The Basis of A Card Majority*, 3 Ga.L.Rev. 349, 351 (1969).

where they may have been only "minor or less extensive" unfair labor practices (*Gissel*, 395 U.S. at 615), "it is difficult to perceive how [a bargaining] order issued in the absence of any independent unfair labor practices may be upheld."[14] The "key to the issuance of a bargaining order" is not whether a union presents convincing or unconvincing evidence of majority support but, conversely, as the Board concluded here, whether the employer has committed "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election". *Gissel*, 395 U.S. at 594.

II.

AN EMPLOYER WHO DOES NOT INTERFERE WITH THE BOARD'S ELECTION PROCESSES, AND INSISTS THAT A UNION DEMONSTRATE ITS CLAIMED MAJORITY STATUS IN A SECRET BALLOT ELECTION, IS NOT REQUIRED TO PETITION FOR SUCH AN ELECTION.

The Court of Appeals concluded that, although secondary evidence of union support does not automatically invoke a duty to bargain, if an employer chooses not to recognize a union on the basis of such evidence, "[t]he employer must be put to some other kind of test *to evidence good faith*": that the contrary position adopted by the Board "is inconsistent with the Act and . . . must be reversed." (Pet., pp. A19, n. 42 and A26; emphasis added). Apart from the offense that adoption of this heretofore un-

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[14] Foss and Kobdish, *Gissel Packing and Bargaining Orders, Or: A Funny Thing Happened on the Way to the Election*, 41 Geo. Wash. L. Rev. 44, 81 (1972).

predecented view does to basic principles of administrative comity,[15] it is incompatible with both *Gissel* and the Act itself.

A.

As demonstrated above, the thrust of the Taft-Hartley amendments and *Gissel* was two-fold: to establish the superiority of the election processes and to eliminate any inquiry into an employer's subjective motivation to assess the propriety of a bargaining order. Consistent with these principles, apart from those instances where employer misconduct obviates a fair election, bargaining orders premised on secondary evidence of majority status must be restricted to objective repudiations of an agreement to recognize or bargain with a union. *Snow & Sons*, 134 NLRB 709, *enf'd*, 308 F.2d 687 (9th Cir. 1962), where an employer "reneged on his agreement to bargain" and only then "in-

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[15] The "great deference to the interpretation given the statute by the officers or agency charged with its administration" is "particularly . . . due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly . . .'" *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Board decision here was based upon such considerations (Pet., pp. A41-42), and even if, assuming *arguendo*, it was susceptible of "different constructions" (*Udall*, 380 U.S. at 18), it must be accorded deference unless it falls within the extreme classification of amounting to plain rejection of Congressional policy. *Local Lodge No. 1424, Machinists* v. *N.L.R.B.*, 362 U.S. 411, 428-429 (1960). That extreme situation is obviously rendered inapplicable in this case by the lower court's own acknowledgment (Pet., p. A14) that there "is no clear cut" directive in either "the statute or the legislative history" concerning "the focal issue" involved. See also *Food Store Employees, Local 347* v. *N.L.R.B.*, ... U.S. ....., 86 LRRM 2209 (May 20, 1974); and *Gissel*, 395 U.S. at 612, n. 32.

sisted on an election" (*Gissel*, 395 U.S. at 593), presented the latter situation. That case, which has been limited by the Board to its facts (*id.* at 594),[16] merely applied the well-established rule that once an employer voluntarily recognizes a union he may not thereafter breach that

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[16] Dissenting Board Members Fanning and Brown's construction of *Snow* to stand for a broad "independent knowledge" test which would justify a bargaining obligation in this case (Pet., pp. A45, A50-A51) is no longer tenable. *Snow* expressly rested upon the good faith doubt rationale of *Joy Silk Mills, Inc.*, 85 NLRB 1263, *enf'd.*, 185 F.2d 732, (D.C. Cir., 1950), *cert. den.*, 341 U.S. 914. See *Snow*, 134 NLRB at 710-711 ("The Board has held [citing *Joy Silk Mills*] that the right of an employer to insist on a Board-directed election is not absolute. Where, as here, the Employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without valid ground therefor, he has failed to fulfill the bargaining requirements under the Act"). The Board, however, has now rejected this approach (see n. 19, *infra*) and *Snow* is further undermined by *Gissel's* approval of the demise of *Joy Silk Mills*. Members Fanning and Brown's view of *Snow*, therefore, is tantamount to resurrection of a repudiated good faith doubt test and, even if once supportable, is now without merit.

agreement;[17] an employer may not renege upon an agreement to conditionally recognize a union any more than he may refuse to comply with an agreement to grant a labor organization unconditional recognition or refuse to abide by a collective bargaining contract. In none of these cases is any inquiry into subjective motivation pertinent. Here, by contrast, the Court of Appeals has insisted upon a "test to evidence good faith" (Pet., p. A26). The Board's refusal to reenter this "thicket" (Pet., p. A41) is thus consistent with *Snow & Sons* as consistently interpreted by the Board prior to *Gissel*[18] and approved therein. 395 U.S. at 594.

The lesson of *Gissel*, which the Board,[19] courts[20] and

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[17] see e.g., *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); and the cases cited at n.10, *supra*.

[18] See Comment, 39 U.Chi.L.Rev. at 320; see also *Strydel, Inc.*, 156 NLRB 1185, 1187 (1966), in which the Board, distinguishing *Snow* and finding no lawful refusal to bargain, found of no force the fact that the company had "denied recognition while rejecting the Union's proposal for submission of the cards to impartial determination." Such a denial, according to the Board, "does not, standing alone, provide an independent basis for concluding that the instant denial of recognition was unlawful."

[19] As the Board had announced in *Aaron Brothers*, 158 NLRB 1077 (1966), "an employer no longer needed to come forward with reasons for rejecting a bargaining demand". At oral argument of *Gissel*, the Board reaffirmed that "an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct . . ." *Gissel*, 395 U.S. at 593-4.

[20] See, e.g., *N.L.R.B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-7 (2nd Cir. 1967).

commentators[21] had all presaged, is that the motive or state of mind of an employer in declining a demand to bargain is irrelevant. As long as the employer refrains from polluting the election atmosphere, and has not agreed to an alternative means of determining majority status, then he has no further obligation. He may, contrary to the decisions below (Pet., p. A26), "disregard" the union's cards "without rhyme or reason" or, as this Court quoted the Board's current practice in *Gissel*, 395 U.S. at 594, respond "with a simple 'no comment' to the union". For if an employer cannot be compelled to bargain in such a case—as the authorities discussed in Part I of this brief amply demonstrate—there is similarly no justification for imposing upon him a new obligation as an alternative penalty for declining recognition. The union in such a case, if it desires to obtain bargaining rights, can readily utilize its cards to obtain an election, as is the usual and preferred practice (395 U.S. at 596 and n. 7) or even, once such a petition has been filed, picket the employer with impunity until there has been a Board certification. The employer is concurrently obligated, under pain of a *Gissel* bargaining order remedy, to avoid any interference with the election procedures. The Court of Appeals, nevertheless, added still another significant ramification of a card-based bargaining demand: that the employer confronted by such a situation, if he refuses recognition, must initiate the Board processes or otherwise evidence his good faith. The Board, as the expert entrusted by Congress to administer the Act, properly rejected such an unwarranted alteration of the statute.

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[21] See, e.g., *Wellman*, *supra* n.11, at 355-7; and Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 Mich. L.Rev. 857, 858-9, 864-5 (1967).

B.

The decision below would impose a substantial judicial alteration of the statute:

1. Section 9(c)(1)(B) of the Act merely *permits* an employer to file an election petition; it in no way *requires* that a petition be filed, as the lower court suggested, in order to "test . . . good faith" (Pet., p. A26). That section, as *Gissel* observed (395 U.S. at 599-600, n. 16), was primarily intended to remove "discrimin[ation] against employers" and create a method for terminating union organizational harassment. In fact, by conditioning the filing of an employer petition on a prior request to bargain, Congress sought to insure that employers would not prematurely force an election during the nascent stages of a union organizational campaign and thus pretermit that campaign, *Id.* at 599, n. 15.[22] Nothing in the legislative history, nor in any case prior to the decision below, indicates that Congress also sought to impose a mandatory filing obligation on employers and to simultaneously free a union demanding recognition from (a) producing the requisite interest showing required by section 9(c)(1)(A) to support a union-filed petition and (b) bearing the significant tactical disadvantage of initially selecting the

[22] See Senate Report No. 105, pp. 11, 25, (1947) I Leg. Hist. of Labor Management Relations Act ("I Leg. Hist."), pp. 417, 431 and House Report No. 245, 80th Cong. 1st Sess., 35, 93 Cong. Rec. 3954 (1947), I Leg. Hist., p. 326. As Chief Judge Haynsworth summarized these portions of the legislative history in *N.L.R.B.* v. *Logan Packing Company*, 386 F. 2d 562, 570 (4th Cir. 1967), reversed by implication in *Gissel* on other grounds: "It was made plain in the Committee reports, . . . that an employer, after receipt of a demand to bargain from a union . . . *need not petition for an election*" (emphasis added).

appropriate bargaining unit and, instead, control both the commencement and duration of the election campaign.[23]

2. The underlying rationale of the decision below, and of the advocates of the position adopted therein, is a desire to expedite the election process and preclude an employer counter-campaign. Pet., p. A24 and n. 48; Comment, 39 U.Chi.L.Rev. at 325-330. The rule adopted by the Court of Appeals, however, as the Board's petition shows (pp. 19-20), is a dubious means of achieving this goal. In any event, the objective sought is one that conflicts with the scheme of the Act. An employer, provided that he avoids election interference, has a "legal right . . . to try to

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[23] See Comment, 39 U.Chi.L.Rev. at 326-7: "If . . . the employer were to petition for an election, he would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a [preelection] hearing [under 29 C.F.R. § 102.63(6) (1971)]. Where the employer petitioned for an election, the union, in effect, would be afforded the opportunity to waive the hearing . . ." Such a waiver is likely since (1) "enthusiasm for the union might have peaked when the card majority was obtained and the request for recognition was made . . . a long hearing could result in the dissipation of its majority status"; (2) "the union might decide to accept a smaller employer-suggested unit in order to establish a 'beachhead' from which it could further organize, rather than risk losing the election because of delay"; and (3), "even if the employer proposed frivolous or ridiculous units to foster delay, the regional director could summarily dispose of these suggestions at the 'investigation' stage [pursuant to 29 C.F.R. §102.63 (1971)] in considering the employer petition; no hearing would be necessary". Moreover, assuming the employer was able, without risking a bargaining order, to request a substantially different unit than that proposed by the union, if this unit was "unacceptable to the union, [the union] could obtain dismissal of the employer's petition without penalty by disclaiming interest in the unit . . ."

persuade [his] employees, including those who signed cards, to disavow the union." *N.L.R.B.* v. *Drives, Incorporated,* 440 F. 2d 354, 364 (7th Cir. 1971). Both section 8(c) and the First Amendment permit him to seek to lawfully dissipate a union's card majority. A labor organization does not have any right to have an election at the "peak" of its organizational effort or to be able to shorten the campaign in order to avoid a "sophisticated" employer response. To the contrary, "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union . . . ." *Gissel,* 395 U.S. at 617. It was, in fact, this desire to permit a full exposure of opposing views that, at least in part, motivated the Board to "no longer requir[e] . . . an employer to show affirmative reasons for insisting on an election . . . " *Ibid.* To force an employer to petition for an election, as the decision below would do, while a union is at the pinnacle of its strength after a long and frequently clandestine one-sided organizational drive, or during a coercive recognitional strike, would effectively vitiate any legitimate employer campaign. If the objective of the Act is truly to insure employee free choice, both sides, not just labor organizations, should be able to reach "all employees with [their] . . . arguments in favor of representation . . . [to avoid the situation where] employees are often unaware of that point of view." *Excelsior Underwear Co.,* 156 NLRB 1236, 1240-1 (1966), approved in *N.L.R.B.* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969).

3. Section 8(b)(7) of the Act was enacted to curb the substantial abuses attendant where a union engages in picketing in order to force an employer to grant recognition and thereby avoid the election process. The decision below, by permitting such a strike to create "a sufficient

probability of majority support" to require that the employer file an election petition even where there is no card majority (Pet., p. A23), flies in the face of the statutory design. *First,* section 8(b)(7)(C) applies to recognitional strikes by even a union enjoying majority status in order that "disputed issues of majority status, whenever possible, [be resolved] by the machinery of a Board election." *C.A. Blinne Construction Co.,* 135 NLRB 1153 (1962).[24] If *Blinne* is correct, as one commentator has noted (*Welles, supra* n. 11, at 353), then "it would obviously be impossible to issue a bargaining order solely because the union had a majority". *Second,* section 8(b)(7)(C) imposes upon a picketing union the obligation to either cease picketing after "a reasonable period of time" or file a petition. The decision below, by compelling the employer to initiate the election process, thus abrogates an employer's right to decline recognition, not file a petition and simply withstand picketing until the union makes its choice.

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[24] See also *Dayton Typographical Union No. 57* v. *N.L.R.B.,* 326 F.2d 634, 637 (D.C.Cir. 1963); and Meltzer, *Organizational Picketing and the NLRB,* 30 U.Chi.L.Rev. 78, 83 (1962).

CONCLUSION

For all the foregoing reasons, it is respectfully prayed that the decision of the Court of Appeals be reversed and this case be remanded to that Court with instructions to enforce the Board's order in its entirety.

Respectfully submitted,

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